

November 30, 1730.

# INFORMATION for *David Henderson* Merchant in *Kilmarnock*,

## Against *Hugh Stewart* and *William Brotherstones* Officers of *Excise* at *Irvine*.

**T**H E said *David Henderson* having, preceeding the 8th of *September* last, purchased in the fair Way of Trade, a Parcel of *Callimancoes*, *Stocking-wires*, *Horn-combs*, &c. and a small Quantity of *White Soap*, he, on the said 8th of *September*, left the same all pack'd together in a Sack, in the House of *William Craig* in *Irvine*, until he should have an Opportunity to send for them, or carry them home, standing openly in the House, without any Concealment, or Appearance of Concealment, as indeed he could know no Occasion for it, being no Importer of Goods, and having bought those Goods in the fair Way of Trade, as is aforesaid.

The Day thereafter, the said *Hugh Stewart* and *William Brotherstones*, now Suspenders, came with a Party of Soldiers to the said *Craig's* House, and, under Pretence of searching for Goods, that fell under their Inspection as Officers of the *Excise*, they violently carried away the said whole Sackfull of Goods, without Distinction; and, as they now inform, went next Day, upon the 10th, or soon after, to an Officer of the Customs, and made him seize the Goods which they had carried away, they themselves, as Officers of the *Excise*, having no earthly Pretence of any Right or Title to touch or seize any of the Goods that were in that Sack, excepting it was the small Parcel of white Soap; which indeed if it had been Soap made within *Scotland*, which had not been duly entred by the Soap-maker, and paid the Duty, they might have had a Pretence for seizing, at least, had it been in the Soap-maker's Hand, but by no means in the Hands of a Purchaser in the fair Way of Trade; But as they themselves have all along owned, that this small Parcel of Soap was not seized by them on that Account, as Soap made within *Britain*, and not duly entred, but as Soap that had been imported into *Britain*, without paying the Duty, they were just as much out of their Sphere, in pretending to touch or seize this Soap on that Account, as they were in *spulzieing* the other Goods, since Soap imported, without Payment of Duty, is no ways under the Management of the Officers of *Excise*.

The said *David Henderson* having Goods thus *spulzied* and carried off, without any Order of Law, but by plain *Violence*, though under a shew of Law, where there was none, pursued the now Suspenders before the Justices of Peace of the Shire of *Ayre*, as guilty of a riotous and violent Proceeding, concluding Restitution and Damages; but as he was not perfectly well advised, what was Law, and did not incline to attack the Officers of the Revenue, upon any Act of theirs for which they could have the least Colour or Pretence, he did not sue for the Value of the Soap, reserving to himself to claim that in a proper Way, but only sued for the *Callimancoes*, *Horn-combs* and other Goods, which no Officer of *Excise* had any Pretence to meddle with; and after a Proof of the Fact, which indeed at this Moment is not refused, but all along admitted, the Justices of the Peace decerned the Suspenders in the Value of the Goods, being about *L. 17*, or otherwise to return the Goods themselves.

A Bill of Suspension of this Decreet was offered in Vacation Time, which was refused by the Lord *Coupar*, but 14 Days further being allowed by his Lordship to the Defenders to return the Goods, they offered a second Bill, and that being passed, the Case was debated before the Lord *Newhall*, who inclined to have found the Letters orderly proceeded, but, at the Desire of the Suspenders's Procurators, was pleased to take the Case to Report.

The Council that appeared for the Suspenders whole Pleadings seemed to consist in a Flourish, rather than an Argument in Law, as to the Necessity and Favour of preserving the Revenue against Frauds, and preventing the Importation of foreign Manufactures, especially Woolen, to the Discouragement of the Woolen Manufactures at home, and really seemed to land in this, *That though the Thing done was admitted to be wrong, and not at all legal or warrantable, yet from these publick Considerations it should be excused; and even that the Suspenders should not be obliged to restore the Goods taken away, but that the Merchant, the Charger, should be left to follow the Custom-house Officers, in whose Hands they, the Spulziers, had lodged the Goods, through the Forms of the Court of Exchequer, in order to procure a Restitution.*

But as to those *Harangues*, no other Answer needs to be made, But that though it is reasonable the Revenue should be protected against Fraud, and the Importation of Woolen Manufactures, to the Prejudice of the Manufactures in *England*, should be discouraged, yet all that must be done according to the Methods prescribed by Law, and by the Persons authorised for that Effect, and none others, otherwise the Laws of the Revenue could easily be made a Handle of, to lay the whole Nation under the most arbitrary Slavery and Hardships; and the best Way of supporting the Revenue, in Consistency with the Liberty of the Subject, is not



to encourage the Officers of it in their Extravagancies against the Subject, when they go beyond the Powers of their Commissions, and pretend to act out of that Sphere, in which alone the Law hath allowed them to move: As it is necessary to protect them, when in their Duty, it would perhaps be better, that no Endeavours were used, either to justify or cover them, when they are out of it.

The direct Defences, so far as the Charger could apprehend them, out of the oratorical Part, were 1<sup>mo</sup>, "That a Parcel of Soap, which the Suspenders had Reason to believe fell under their Inspection, as Officers of the Excise, being found in the Sack, where the other Goods were, they had Reason to carry away the whole Sack, not knowing that there were any other Goods in it, which did not fall under their Care and Management; and that having once carried them away, and finding that there were other Goods, though not falling under their Management, that were suspicious, as what probably might have been imported without Payment of Duties, they had Reason to acquaint the proper Officer of the Customs, who had a Power to seize them; and that he having accordingly made Seizure of them, and returned them into Exchequer, in order to be tried for Condemnation, the Charger could have no Action against them, but must take himself to the Custom-house Officer, and abide his Trial in Exchequer, before he can have Restitution."

2<sup>do</sup>, "That by an Act made in the 11th of the late King, intituled, *An Act for the more effectual preventing Frauds and Abuses in the publick Revenue*, it is by one Clause enacted, *That in case from and after the 24th of June 1725, any Person or Persons whatsoever, shall offer or expose to Sale any Goods, &c. which are, or shall be prohibited, or which actually have been, or shall be, or shall by the Party or Parties so offering or exposing the same to Sale, be pretended to have been run, all such Goods whatsoever, together with the Package whatsoever, including and containing the same, shall be forfeited, and shall, and may be seized by the Party or Parties to whom the same shall be so offered or exposed to Sale, or by any Officer or Officers of the Customs or Excise, provided after such Seizure, the Goods so seized be lodged within a certain Time in a Ware-house belonging to the Customs, or in an Excise Office, in the different Events and Circumstances therein set forth.* That there is another Clause in the same Act, *That all and every the like prohibited or run Goods and Merchandises whatsoever, so, or as such bought by any Person or Persons whatsoever, together with the Package containing the same, shall in like Manner be forfeited, and shall and may be seized and taken from such Buyer, or Buyers thereof, either by the Seller, or Sellers thereof, or by any Officer or Officers of Customs or Excise, provided that such Goods seized from the Buyer, be lodged within the same Time, and in the same Manner, as is directed by the former Clause, in relation to Goods seized from the Seller.* Which Clauses the Lawyers for the Suspenders did, though very faintly indeed, pretend, gave the Suspenders, though only Officers of the Excise, and not of the Customs, a Power to seize the Goods in Question.

And 3<sup>tio</sup>, They alledged, *That the Officer of the Customs who seized the Goods, after the Suspenders had carried them away, did, within 24 Hours after Seizure made, offer them back to the Charger, providing he would swear that these Goods were bought by him in the fair Way of Trade, and that he verily believed the Duties thereof had been paid.*

And lastly, Some Infination was made, *That the Goods were carried out of Craig's House, of Consent, which they pretended to infer from this, That Craig's Wife went along, and saw them lodged in the House, to which the Suspenders carried them.*

It was answered for the Charger, to the first, That the Suspenders, however they might have some colourable Excuse for seizing the small Quantity of Soap, if they had pretended to seize it as made in Scotland, without Payment of the Duty upon it; yet in Reality they had no Warrant to touch the Soap more than the rest, because they did not seize it as Soap made in that Way, but as Soap imported without Payment of the Duty: But the Charger needs not at this Time insist much upon this, because the Value of the Soap, and the carrying of it away, is no Part of the Question now in Hand. But 2<sup>do</sup>, Supposing the Suspenders had been entitled to seize the Soap, what says that as to the other Goods, which it is in Effect admitted they had no Title to seize? They found two or three Dozen of small Wadges of Soap; therefore this entitled them to carry off a whole Sackfull of other Goods; they might as well pretend, that if they found any small Quantity of seizable Goods, in a House, Shop, Waggon or Ship, they might carry off the whole they found within such House, Waggon or Ship, because they did not know but the rest might be prohibited. It is the Duty of Officers in such a Case, first to enquire and Search, before they carry away, and therefore, however they might have seized the Soap, they ought to have examined the other Goods, and seized, or not seized, according as they found they had Law and Authority on their Side, after Examination; nor could they have any Pretence to carry away any Goods, without making the Seizure first, and consequently it is ridiculous to pretend they carried all away, believing that all might be seizable: This is a direct Acknowledgment, that they truly committed a Riot as to the whole, since they could not lawfully carry away any one Thing out of any House, without seizing it first: Now they themselves admit, that they made no Seizure at all of the Goods in Question; but after they had carried them away, sent for a Custom-house Officer, to make Seizure of them: From which it is plain, that their *initium possessionis*, was unlawful in Way of Riot and Violence, which seems to put an End to the whole Question. Nor is it any Excuse, that though they

carried



carried away the Goods unlawfully; they afterwards found out a Custom-house Officer, who might have had a Power to seize them at first, and then they made that Custom-house Officer seize them, in order to palliate or excuse their *Robbery*; if such a Practice were allowed, there would be an End of all Order, and Way made for eternal Breaches of the Peace; to prevent which, the Laws of the Revenue only allow Seizures to be made by Officers lawfully commissioned: And if any Person carry away Goods, who hath not a Power to seize, he is guilty at least of a *Riot*, if not a *Robbery*; and if twenty Custom-house Officers after that should seize the Goods so carried away, in his Hand, with his Connivance, or by his Information, or without it; or if he should deliver them over to the Custom-house Officers, that they may seize them, he remains liable in the *Spulzie*, and answerable for the Value or Restitution, whether the Goods should be found lawfull Seizure or not, *spoliatus est restituendus* by the Spulzier; and it is no Defence to him, that the Thing spulzied was carried off from him, even by a Person having a better Right, but far less that he delivered them over to one, whom he believed to have a Right, and that the Possessor must go try his Right in a Competition with that other, to whom, forsooth, the *Spulzier* has given up the Effects, and that even voluntarily, in order to make a Foundation for a Plea.

The Suspenders admitted, that the general Rule was, that *spoliatus est ante omnia restituendus*; but pretended that might admit of Exceptions in some extraordinary Cases, and were pleased indeed to state a very extraordinary one; *What if a Man should spulzie a stolen Horse, from a Thief, and that the Owner finding his own Horse, should seize him in Possession of the Spulzier?* As to which in the first Place, It may be justly doubted, if even in that Case, the Spulzier would not be liable in a Spulzie. But 2<sup>do</sup>, Such Case is nothing to the Purpose, any Man may stop a stolen Horse, in the Hands of a Thief, if he make it appear that the Horse is stolen, and detain him for the Use of the Owner, and such *Detention* would be no Spulzie: But that is not the Case as to Goods seized in a trading Merchant's Hand, and a fair Trader too, yea no Matter suppose it were a Runner of Goods, a Man that hath not a Title to seize, can't carry off those Goods, and then defend himself upon that Pretence, that they were liable to Seizure; what was that to him that run away with them? 3<sup>tio</sup>, What has that Case, of Goods found in the Hands of a Thief, to do with Goods found in the Hands of one that bought them in the Way of Trade? Your Lordships have even found, *That a Runner of Goods had an Action against an Imbezler*. But what State should the Subject be in, if a Man might carry off any Goods, out of the Hands of a Possessor, without so much as knowing or enquiring what Way the Possessor came by them? and then might afterwards pretend, they were foreign Goods that had not paid the Duty; and that the Owner could not have Restitution, until he proved in a Trial against an Officer suborn'd to seize, that the Duties were paid. This may be said to be an extraordinary Case; but indeed if such a Thing were allowed, the Case would soon become very ordinary, though the Judgment would be very extraordinary.

As to the Second Defence, *That by the said Act of the 11th of the late King, any Officer, whether of Excise or Customs, might seize any Goods, yea that a Buyer might seize from the Seller, or a Seller from the Buyer*, This was but faintly insisted on, because the Suspenders Lawyers were sensible that the Act could admit of no such Construction, and is no ways applicable to the present Case. Your Lordships have the two Clauses above set forth; and from both of them it is to be observed, that the Seizures therein allowed to be made are only in the Case of *exposing to Sale*, and at the Time such Goods are *exposed to Sale*; but at no other Time: So that if a Person were possessed of never so many prohibited or run Goods, they can't be seized upon the Clauses in this Act, whatever they may be upon others. For your Lordships see in this Case, the Charger was exposing nothing to Sale: There was no Buyer and Seller there present. And that this is the Meaning, is plain from the Words of the Law, *That if any Person offer to expose to Sale any fraudulent Goods, the Buyer may seize them*. Your Lordships see, the Buyer cannot seize them except when they are offered to Sale: He cannot seize from himself. At the same time the Buyer can seize them, any officer of the Customs or Excise may seize them; but still it must be at the same Time, *viz. in the Act of exposing them to Sale*. And so far is the Import of the first Clause with regard to Goods prohibited.

But in the next Place, Your Lordships will observe the Difference in the Clause betwixt *prohibited Goods* and *run Goods*. *Prohibited Goods* may be seized by the Buyer in any Case, when they are *exposing to Sale*; but not *run Goods*. That indeed had been absurd: For at that rate no Goods subject to Duties could ever be exposed to Sale, but a Buyer might immediately seize them on pretence of their being run. But your Lordships will observe the Words as to *run Goods*: *If a Person expose Goods to Sale which are prohibited, or shall by the Party or Parties so offering or exposing the same to Sale be pretended to have been run, such Goods may be seized*. Whereby it is evident, that *run Goods* cannot be seized, even when they are exposed to Sale, unless they be exposed *as run Goods*, and be owned by the Party as such; which Clause is calculate to prevent the clandestine Trade carried on by avowed Smugglers, who sell Goods at a cheaper Rate to private Persons *as Goods that are truly run*, and have not paid Duties. And even in that Case, according to the first Clause the Seizure can only be from the Seller, or Person *exposing to Sale*.

And



And just so, by the second Clause, which concerns seizing Goods from the *Buyer*, the Seller or Officer of Customs or Excise, which your Lordships see must still be at the Time of selling, may seize prohibited or run Goods, Wares or Merchandises whatsoever, so, or as such bought by any Person or Persons whatsoever. From which your Lordships see, that there is even a Difference betwixt a Seizure from the *Buyer*, and a Seizure from the *Seller*. Prohibited Goods may be seized from the Seller at the Time of Sale, if they appear to be prohibited; because it is supposed a Seller cannot sell *prohibited Goods* without knowing that they are prohibited: But prohibited Goods cannot be seized from the *Buyer*, except he actually buy or be buying them *as such*. And as to *run Goods*, they cannot be seized either from Buyer or Seller, upon this Act, by the Buyer or Seller, or Officers of the Customs or Excise, except they be bought and sold as *run Goods*: Then they may be seized, but only at the Time of Sale.

And here we may observe, that the Question is concerning Goods pretended to be run, because the Suspenders themselves set forth, and have produced an Instrument to prove it, "That the Goods were offered back, providing the Charger would swear that he verily believed they had *paid the Duty*." Ergo the Goods were not *prohibited*, but were such as the Officers admitted were *liable to Duties*.

It might also be noticed, that where 'tis said the Goods may be seized by any Officer of the Customs or Excise, that that must be *applicando singula singulis*; Goods under the Direction of the Customs by Officers of the Customs, and those under the Direction of the Excise by Officers of Excise. But 'tis needless to insist upon that, because we are not in the Case of that Act: The Goods are not seized *while exposing to Sale*, but lying in a private House, to be applied, for any thing known, to the private Use of the *Buyer*, who had bought them in a fair Way of Trade, and who was not buying them *as run Goods*, nor not then buying them at all.

But lastly, What puts an End to the Question upon this Act of Parliament is, that supposing the Suspenders could have seized them, 'tis admitted they did not seize them; but carried them away without seizing, and afterwards sent for an Officer of the Customs to seize them: So that their *Act* in carrying them away without pretending to make a *Seizure*, was a plain Riot and Violence.

As to the *Third Defence*, That the Custom-house Officer offered them back, if the Charger would have sworn that he had bought them in a fair Way of Trade, and verily believed they had paid the Duty, It can signify nothing. The Charger had nothing to do with the Custom-house Officer, and was not bound to notice what the Suspenders, who once spolized the Goods, did with them: His Action of Restitution lay against them, and he was bound to take notice of no other Person. Indeed if the Custom-house Officer had seized the Goods from him, and carried them off in a regular Manner, then the Law empowered the Merchant to make Oath, that he had bought them in a fair Way of Trade, and that he verily believed they had paid the Duties: And in that Case they must have been restored to the Merchant; though by the by not by the Officer of the Customs, who have no Power to do it, though the Oath may be made before him; but they must be restored by the Commissioners of the Customs. But in this Case the Charger was not bound to make any Oath; nor was there Place for it, because the Goods were not seized from him by any *lawful Authority*, but carried off in way of *Spulzie*.

It is true, the Justices of the Peace did *ex superabundanti* require the Charger's Oath, That he had bought the Goods in a fair Way of Trade, and was not concerned in any running or Importation of them. But this is more than he was bound to. 'Tis true, the Suspenders noticed, That he had not sworn that he verily believed they had paid the Duties. But, as is already said, he was not bound to do that in this Case, where the Goods were not seized, but spolized: And 'tis scarce possible he could have done it, because he never owned they were Goods imported; and so must rather have sworn, that to his Judgment they were Goods manufactured in Great Britain, subject to no Duty.

As to the *Last Defence*, That the Goods were to be look'd upon as carried away of consent, because the Landlord and Landlady from whose House they were carried off, desired that no Soldiers might be brought into their House, since they were to use no Violence in opposing the carrying off the Goods, and that the Landlady went along to see where they were put, 'Tis frivolous. For First, Neither the Landlord nor Landlady ever pretended the Goods were theirs, though they were left in their House. 2do, They never consented to their taking them away, but only desired Soldiers might not be brought in, for fear of rifling their House: And that they would not oppose by Violence the carrying away the Goods, if the Suspenders would take upon them to do it; This was far from a Consent; the Action was no less a *Spulzie* because there was not a violent Opposition made.

Upon the whole, It is plain the Goods were carried off without Authority of Law, and that as Officers of the Revenue ought to be protected in the Exercise of their Duty, they ought to feel the Weight of the Law when they transgress or go beyond it, and in such Cases even deserve Punishment: But sure it will never be allowed, that they shall carry off Goods at their own hand, without Order of Law, afterwards trump up a Seizure by another Person, in order to palliate their Abuses, and save them from Restitution; and therefore the Letters ought to be found orderly proceeded.

